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COURT OF CRIMINAL APPEALS
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COURT OF CRIMINAL APPEALS

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COURT OF CRIMINAL APPEALS
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***TEXAS RULES OF APPELLATE PROCEDURE*, RULE 68.4**

CHRISTOPHER SIMMS

v.

THE STATE OF TEXAS

On Petition for Discretionary Review from the First Court of Appeals in No. 01-18-00539-CR Affirming the Conviction in No. 1591795 from the 230th Judicial District Court of Harris County, Texas

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APPELLANT'S PETITION FOR DISCRETIONARY REVIEW

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COUNSEL ON APPEAL

NAMES AND ADDRESSES OF ALL PARTIES AT THE TRIAL COURT'S FINAL JUDGMENT

Trial Judge

Honorable Mike Wilkinson, Judge Presiding
230th District Court
201 Caroline, 12th Fl., Houston, Texas 77002

Appellant/Defendant

Mr. Christopher Simms
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TO THE HONORABLE COURT OF CRIMINAL APPEALS:

COMES NOW, CHRISTOPHER SIMMS, appellant in the above entitled and numbered cause, by and through his appointed counsel, ALLEN C. ISBELL, and petitions the Court of Criminal Appeals to review the opinion by the First Court of Appeals, and respectfully shows this Court the following in support of his petition.

Statement of the Nature of the Case

This appeal arises from a conviction for Aggravated Assault-Serious Bodily Injury in the 230th District Court of Harris County, Texas, the Honorable Mike Wilkinson, Judge presiding. The jury found appellant guilty. Appellant pled "True" to the two enhancement paragraphs in the indictment. The jury sentenced appellant to forty-five (45) years in the Texas Department of Criminal Justice, Institutional Division.

Statement of Procedural History

The First Court of Appeals handed down an opinion affirming the conviction on November 14, 2019. *Texas Rules of Appellate Procedure,* Rule 68.2(a) requires that the first petition be filed within 30 days after the day the court of appeal's judgment was rendered unless an extension of time was granted. This petition is filed within the time allowed by law.

Ground for Review Number One

Whether the Court of Appeals properly protected appellant's right to an instruction on a lesser included offense by failing to consider his testimony regarding an intervening circumstance that caused the accident resulting in death?

Reason for Review

Review is sought pursuant to *Texas Rules of Appellate Procedure,* Rule 66.3(a). The question before this Court is whether the existence of some evidence of an intervening circumstance between an admittedly reckless act and the act resulting in injury is sufficient to entitle a defendant to an instruction on the lesser included offense of deadly conduct. This Court's opinion on this issue will enable the bench and bar to better determine when an instruction on deadly conduct is required.

The First Court of Appeals relied upon this Court's opinion in *Guzman v. State,* 188 S.W.3d 185 (Tex. Crim. App. 2006) in concluding that appellant was not entitled to his requested jury instruction on the lesser included offense of deadly conduct. In *Guzman*, the defendant admitted that he intentionally committed every act resulting in serious bodily injury so no lesser included offense instruction was required. *Guzman* is distinguishable on the facts.

A more applicable authority is *Isaac v . State,* 167 S.W.3d 469 (Tex. App. Houston [14th] Dist. 2005, pet. ref'd), in which the defendant admitted that he recklessly took a loaded firearm to the scene, but testified that the gun discharged, resulting in injury, only after another person struck his arm. The Fourteenth Court of Appeals held that an instruction on the lesser included offense was required.

In the instant case, appellant admitted that he was reckless by speeding, but testified that he crossed into another lane of traffic and hitting another vehicle only after losing consciousness, an intervening factor.

Conclusion and Prayer

Appellant prays that this Court grant his Petition for Discretionary Review. Following the grant of review, appellant prays that this court reverse the judgment of conviction and remand the case to the trial court for new trial.

Respectfully submitted,

/s/ Allen C. Isbell

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Certificate of Service

I hereby certify that on this 11th day of December, 2019, a true and correct copy of the foregoing was sent to the District Attorney's Office, Appellate Division, to the State Prosecuting Attorney, and to Mr. Christopher Simms, appellant.

/s/ Allen C. Isbell
ALLEN C. ISBELL

Certificate of Compliance

The undersigned attorney on appeal certifies this petition is computer generated and consists of 981 words. Counsel is relying on the word count provided by the Word Perfect computer software used to prepare the petition.

/s/ Allen C. Isbell
ALLEN C. ISBELL

Opinion issued November 14, 2019

In The

Court of Appeals

For The

First District of Texas

NO. 01-18-00539-CR

CHRISTOPHER SIMMS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 230th District Court
Harris County, Texas
Trial Court Case No. 1591795

MEMORANDUM OPINION

A jury convicted appellant Christopher Simms of aggravated assault causing serious bodily injury, and, after finding two enhancement allegations true, it assessed punishment of 45 years in prison. On appeal, Simms argues that the trial

court erred by not instructing the jury on the lesser-included offense of deadly conduct.

We affirm.

Background

Simms was speeding when he drove his Chevy Impala into the two-lane Washburn tunnel in Harris County. Eduardo Gonzalez Pineda was driving a van in the opposite direction. Simms's car collided with Pineda's van in a head-on collision. A witness, Oscar Barrera, who was driving behind Pineda testified that he and Pineda were driving approximately at the speed limit of 35 miles per hour. A videorecording from the tunnel was played at trial and it showed Simms's car was completely in Pineda's lane just before and at the moment of collision.

Both Simms and Pineda were injured and received emergency and in-patient medical care. Pineda spent about five days in the hospital recovering from internal injuries and emergency surgery. Two days after he was discharged, Pineda began vomiting blood, and he returned to the emergency room, where he later died from injuries caused by the head-on collision.

An investigation of the collision, which included gathering data from the Impala's crash data retrieval system, showed that Simms was travelling at 62 miles per hour two seconds before impact and 58 miles per hour one-half second before impact. In addition, the accelerator position went from 8% to 100% from two

seconds before impact to one-half second before impact. According to accident investigator Harris County Deputy B. Wilbanks, this indicated that Simms had "floored" the accelerator just before impact, although the car had no time to respond and accelerate. In addition, crash data collected from the Impala showed that Simms never applied his brakes.

Simms testified at trial that he recalled entering the Washburn tunnel, but he did not recall anything after that until he awoke in pain in the hospital. A nurse told him that he had been injured in an automobile accident. Simms admitted that he was driving the car that caused the accident and speeding at the time He also admitted that he failed to stay in his lane and to keep a proper lookout. But he denied having been tired or under the influence of alcohol, medication, or illegal substances at the time of the accident. Because he had no recollection of the collision, Simms relied on the videorecording to conclude that he "apparently" "dozed off" or passed out.

At the close of evidence, Simms requested a jury charge on the lesser-included offense of deadly conduct, and the trial court denied the request. The jury convicted Simms, and he appealed.

Analysis

On appeal, Simms argues that the trial court erred by denying his request for a lesser-included offense instruction.

"We review the trial court's decision regarding including a lesser-included offense in the jury charge for abuse of discretion." *Brock v. State*, 295 S.W.3d 45, 49 (Tex. App.—Houston [1st Dist.] 2009, pet. ref'd); *see Jackson v. State*, 160 S.W.3d 568, 575 (Tex. Crim. App. 2005). An offense is a lesser-included offense if:

> (1) it is established by proof of the same or less than all the facts required to establish the commission of the offense charged;
>
> (2) it differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property, or public interest suffices to establish its commission;
>
> (3) it differs from the offense charged only in the respect that a less culpable mental state suffices to establish its commission; or
>
> (4) it consists of an attempt to commit the offense charged or an otherwise included offense.

TEX. CODE CRIM. PROC. art. 37.09.

A two-part test is used to determine whether a defendant is entitled to an instruction on a lesser-included offense. *See Cavazos v. State*, 382 S.W.3d 377, 382–83 (Tex. Crim. App. 2012). The first step, which is a question of law, "compares the elements alleged in the indictment with the elements of the lesser offense" to determine "if the proof necessary to establish the charged offense also includes the lesser offense." *Id.* at 382. The second step requires consideration of whether there is some evidence that would allow a rational jury to acquit the defendant of the greater offense while convicting him of the lesser-included

offense. *Id.* at 383; *Sweed v. State*, 351 S.W.3d 63, 68 (Tex. Crim. App. 2011). "[I]t is not enough that the jury may disbelieve crucial evidence pertaining to the greater offense, but rather there must be some evidence directly germane to the lesser-included offense for the finder of fact to consider before an instruction on a lesser-included offense is warranted." *Bullock v. State*, 509 S.W.3d 921, 925 (Tex. Crim. App. 2016).

A person commits aggravated assault by committing assault as defined by Texas Penal Code § 22.01 and by causing "serious bodily injury" to another. TEX. PENAL CODE § 22.02(a)(1). A person commits assault by "intentionally, knowingly, or recklessly" causing "bodily injury to another." *Id.* § 22.01. A person commits the offense of deadly conduct when he "recklessly engages in conduct that places another in imminent danger of serious bodily injury." *Id.* § 22.05. The State concedes that deadly conduct is a lesser-included offense of aggravated assault causing serious bodily injury and that the first prong of the test is satisfied.

We therefore need only determine whether the evidence would allow a rational jury to find that Simms was guilty only of the lesser offense of deadly conduct. Simms argues on appeal that because he passed out or "dozed off" after entering the tunnel, he was reckless only in regard to his conduct of speeding into the tunnel and not in regard to causing the head-on collision because he was unconscious. "A person acts recklessly, or is reckless, with respect to

circumstances surrounding his conduct or the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur." TEX. PENAL CODE § 6.03(c). Recklessness is a culpable mental state for both deadly conduct and aggravated assault. *See* TEX. PENAL CODE §§ 22.01, 22.02, 22.05; *Pogue v. State*, No. 05-12-00883-CR, 2013 WL 6212156, at *4 (Tex. App.—Dallas Nov. 27, 2013, no pet.) (mem. op.; not designated for publication).

In *Guzman v. State*, 188 S.W.3d 185 (Tex. Crim. App. 2006), the defendant put a gun to his girlfriend's head and pulled the trigger. The gun fired, and she was seriously injured. 188 S.W.3d at 186. The defendant was convicted of attempted murder, and on appeal, he argued that the court erred by not including an instruction on the lesser-included offense of deadly conduct. *Id.* at 188. He asserted that he had removed the clip from the gun and did not know that there was a bullet in the chamber when he pulled the trigger. *Id.* at 187. Therefore, he contended that the shooting was accidental, and he was guilty only of deadly conduct. *Id.*

The Court of Criminal Appeals explained that the defendant could not "argue that there is some evidence that he 'recklessly engaged in conduct that places another in imminent danger of serious bodily injury,' but no evidence that he 'recklessly caused serious bodily injury,' simply by arguing that he did not act with actual recklessness." *Id.* at 193. In that case, the reckless act of pointing the

gun at his girlfriend's head would support both a deadly conduct and an attempted murder charge. *Id.*

In this case, Simms conceded that he was reckless in speeding into the tunnel. That act of recklessness likewise supports both deadly conduct and aggravated assault. *See id.* Moreover, Simms testified that he was speeding, failed to keep a proper lookout, and failed to stay in his lane. He also testified that he caused serious bodily injury to Pineda, who died as a result of those injuries. In *Guzman*, the defendant also admitted that "he had a reckless state of mind and that his conduct resulted in serious bodily injury." *Id.* at 194. The Court of Criminal Appeals concluded that there was no evidence that would permit a rational jury to find the defendant guilty only of deadly conduct and not guilty of aggravated assault. *Id.* The same is true in this case. Because Simms admitted to his reckless state of mind and that his conduct caused Pineda serious bodily injury, the second step of the two-prong test for instructing a jury on a lesser-included offense is not satisfied. We hold that the trial court did not abuse its discretion by denying Simms's requested jury instruction. We overrule Simms's sole issue.

Conclusion

We affirm the judgment of the trial court.

Peter Kelly
Justice

Panel consists of Justices Kelly, Hightower, and Countiss.

Do not publish. TEX. R. APP. P. 47.2(b).